# Customs Bulletin

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# and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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*This issue contains*



DEPARTMENT OF THE TREASURY
U.S. Customs Service

## NOTICE

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# U.S. Customs Service

(T.D. 76-260)

*Air Commerce Regulations—Customs Regulations amended*

Section 6.13, Customs Regulations, setting forth a list of designated international airports, amended

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
*Washington, D.C.*

## TITLE 19—CUSTOMS DUTIES

### CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 6 — AIR COMMERCE REGULATIONS

Section 6.13 of the Customs Regulations (19 CFR 6.13) sets forth a list of internatioanl airports designated by the Secretary of the Treasury pursuant to 49 U.S.C. 1509(b) as ports of entry for civil aircraft arriving in the United States. Since this list was prepared, a number of these airports have changed their official names. This amendment to section 6.13 merely furnishes an up-to-date list of the location and name of each designated airport.

Accordingly, section 6.13 of the Customs Regulations (19 CFR 6.13) is amended by substituting the following list of international airports of entry for the present list contained in that section:

PART 6 — AIR COMMERCE REGULATIONS

**§ 6.13 List of international airports.**[1]

* * *

| *Location* | *Name* |
|---|---|
| Akron, Ohio | Akron Municipal Airport |
| Albany, New York | Albany County Airport |
| Baudette, Minnesota | Baudette International Airport |
| Bellingham, Washington | Bellingham International Airport |
| Brownsville, Texas | Brownsville International Airport |
| Burlington, Vermont | Burlington International Airport |

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Accordingly, section 6.13 of the Customs Regulations (19 CFR 6.13) is amended by substituting the following list of international airports of entry for the present list contained in that section:

PART 6 — AIR COMMERCE REGULATIONS

§ 6.13 List of international airports.*

* * *

| Location | Name |
|---|---|
| Akron, Ohio | Akron Municipal Airport |
| Albany, New York | Albany County Airport |
| Bemidji, Minnesota | Bemidji International Airport |
| Bellingham, Washington | Bellingham International Airport |
| Brownsville, Texas | Brownsville International Airport |
| Burlington, Vermont | Burlington International Airport |

| *Location* | *Name* |
|---|---|
| Calexico, California | Calexico International Airport |
| Caribou, Maine | Caribou Municipal Airport |
| Chicago, Illinois | Midway Airport |
| Cleveland, Ohio | Cleveland Hopkins International Airport |
| Cut Bank, Montana | Cut Bank Airport |
| Del Rio, Texas | Del Rio International Airport |
| Detroit, Michigan | Detroit City Airport |
| Detroit, Michigan | Detroit Metropolitan Wayne County Airport |
| Douglas, Arizona | Bisbee-Douglas International Airport |
| Duluth, Minnesota | Duluth International Airport |
| Duluth, Minnesota | Sky Harbor Airport |
| Eagle Pass, Texas | Eagle Pass Municipal Airport |
| El Paso, Texas | El Paso International Airport |
| Fort Lauderdale, Florida | Fort Lauderdale-Hollywood International Airport |
| Friday Harbor, Washington | Friday Harbor Seaplane Base |
| Grand Forks, North Dakota | Grand Forks International Airport |
| Great Falls, Montana | Great Falls International Airport |
| Havre, Montana | Havre City-County Airport |
| Houlton, Maine | Houlton International Airport |
| International Falls, Minnesota | Falls International Airport |
| Juneau, Alaska | Juneau Municipal Airport |
| Juneau, Alaska | Juneau Harbor Seaplane Base |
| Ketchikan, Alaska | Ketchikan Harbor Seaplane Base |
| Key West, Florida | Key West International Airport |
| Laredo, Texas | Laredo International Airport |
| Massena, New York | Richards Field |
| McAllen, Texas | Miller International Airport |
| Miami, Florida | Chalk Seaplane Base |
| Miami, Florida | Miami International Airport |
| Minot, North Dakota | Minot International Airport |
| Nogales, Arizona | Nogales International Airport |
| Ogdensburg, New York | Ogdensburg Harbor |
| Ogdensburg, New York | Ogdensburg International Airport |
| Oroville, Washington | Dorothy Scott Airport |
| Oroville, Washington | Dorothy Scott Seaplane Base |
| Pembina, North Dakota | Pembina Municipal Airport |
| Portal, North Dakota | Portal Municipal Airport |
| Port Huron, Michigan | St. Clair County International Airport |
| Port Townsend, Washington | Jefferson County International Airport |
| Ranier, Minnesota | Ranier International Seaplane Base |
| Rochester, New York | Rochester-Monroe County Airport |
| Rouses Point, New York | Rouses Point Seaplane Base |
| San Diego, California | San Diego International Airport (Lindbergh Field) |
| Sandusky, Ohio | Griffing-Sandusky Airport |
| Sault Ste. Marie, Michigan | Sault Ste. Marie City-County Airport |
| Seattle, Washington | King County International Airport |
| Seattle, Washington | Lake Union Air Service (Seaplanes) |
| Spokane, Washington | Felts Field |

| Location | Name |
| --- | --- |
| Calexico, California | Calexico International Airport |
| Caribou, Maine | Caribou Municipal Airport |
| Chicago, Illinois | Midway Airport |
| Cleveland, Ohio | Cleveland Hopkins International Airport |
| Cut Bank, Montana | Cut Bank Airport |
| Del Rio, Texas | Del Rio International Airport |
| Detroit, Michigan | Detroit City Airport |
| Detroit, Michigan | Detroit Metropolitan Wayne County Airport |
| Douglas, Arizona | Bisbee-Douglas International Airport |
| Duluth, Minnesota | Duluth International Airport |
| Duluth, Minnesota | Sky Harbor Airport |
| Eagle Pass, Texas | Eagle Pass Municipal Airport |
| El Paso, Texas | El Paso International Airport |
| Fort Lauderdale, Florida | Fort Lauderdale-Hollywood International Airport |
| Friday Harbor, Washington | Friday Harbor Seaplane Base |
| Grand Forks, North Dakota | Grand Forks International Airport |
| Great Falls, Montana | Great Falls International Airport |
| Havre, Montana | Havre City-County Airport |
| Houlton, Maine | Houlton International Airport |
| International Falls, Minnesota | Falls International Airport |
| Juneau, Alaska | Juneau Municipal Airport |
| Juneau, Alaska | Juneau Harbor Seaplane Base |
| Ketchikan, Alaska | Ketchikan Harbor Seaplane Base |
| Key West, Florida | Key West International Airport |
| Laredo, Texas | Laredo International Airport |
| Massena, New York | Richards Field |
| McAllen, Texas | Miller International Airport |
| Miami, Florida | Chalk Seaplane Base |
| Miami, Florida | Miami International Airport |
| Minot, North Dakota | Minot International Airport |
| Nogales, Arizona | Nogales International Airport |
| Ogdensburg, New York | Ogdensburg Harbor |
| Ogdensburg, New York | Ogdensburg International Airport |
| Oroville, Washington | Dorothy Scott Airport |
| Oroville, Washington | Dorothy Scott Seaplane Base |
| Pembina, North Dakota | Pembina Municipal Airport |
| Portal, North Dakota | Portal Municipal Airport |
| Port Huron, Michigan | St. Clair County International Airport |
| Port Townsend, Washington | Jefferson County International Airport |
| Ranier, Minnesota | Ranier International Seaplane Base |
| Rochester, New York | Rochester-Monroe County Airport |
| Rouses Point, New York | Rouses Point Seaplane Base |
| San Diego, California | San Diego International Airport (Lindbergh Field) |
| Sandusky, Ohio | Griffing-Sandusky Airport |
| Sault Ste. Marie, Michigan | Sault Ste. Marie City-County Airport |
| Seattle, Washington | King County International Airport |
| Seattle, Washington | Lake Union Air Service (Seaplanes) |
| Spokane, Washington | Felts Field |

| *Location* | *Name* |
|---|---|
| Tampa, Florida | Tampa International Airport |
| Tucson, Arizona | Tucson International Airport |
| Watertown, New York | Watertown New York International Airport |
| West Palm Beach, Florida | Palm Beach International Airport |
| Williston, North Dakota | Sloulin Field International Airport |
| Wrangell, Alaska | Wrangell Seaplane Base |
| Yuma, Arizona | Yuma International Airport |

(R.S. 251, as amended, sec. 624, 46 Stat. 759, sec. 1109, 72 Stat. 799, as amended (19 U.S.C. 66, 1624, 49 U.S.C. 1509))

Because this amendment merely conforms the Customs Regulations with certain administrative changes, notice and public procedure thereon is found to be unnecessary and good cause exists for dispensing with a delayed effective data under the provisions of 5 U.S.C. 553.

*Effective date.* This amendment shall be come effective upon publication in the FEDERAL REGISTER. (095627)

(ADM-9-03)

VERNON D. ACREE,
*Commissioner of Customs.*

Approved September 7, 1976,
DAVID R. MACDONALD,
*Assistant Secretary of the Treasury.*

[Published in the FEDERAL REGISTER September 14, 1976 (41 FR 39021)]

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(T.D. 76-261)

*Articles Prohibited Entry—Customs Regulations amended*

Section 12.40(c) of the Customs Regulations, relating to the seizure and disposition of articles or matter prohibited entry, amended

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
*Washington, D.C.*

## TITLE 19—CUSTOMS DUTIES

### CHAPTER I—UNITED STATES CUSTOMS SERVICE

#### PART 12 – SPECIAL CLASSES OF MERCHANDISE

Section 12.40(b) of the Customs Regulations (19 CFR 12.40(b)) provides, in part, that upon the seizure of articles or matter prohibited

| Location | Name |
|---|---|
| Tampa, Florida | Tampa International Airport |
| Tucson, Arizona | Tucson International Airport |
| Watertown, New York | Watertown New York International Airport |
| West Palm Beach, Florida | Palm Beach International Airport |
| Williston, North Dakota | Sloulin Field International Airport |
| Wrangell, Alaska | Wrangell Seaplane Base |
| Yuma, Arizona | Yuma International Airport |

(R.S. 251, as amended, sec. 624, 46 Stat. 759, sec. 1109, 72 Stat. 799, as amended (19 U.S.C. 66, 1624, 49 U.S.C. 1509))

Because this amendment merely conforms the Customs Regulations with certain administrative changes, notice and public procedure thereon is found to be unnecessary and good cause exists for dispensing with a delayed effective date under the provisions of 5 U.S.C. 553.

*Effective date.* This amendment shall be come effective upon publication in the FEDERAL REGISTER. (005027)

(ADM-3-03)

VERNON D. ACREE,
*Commissioner of Customs.*

*Approved September 7, 1976.*

DAVID R. MACDONALD,
*Assistant Secretary of the Treasury.*

[Published in the FEDERAL REGISTER September 14, 1976 (41 FR 39021)]

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(T.D. 76-201)

Articles Prohibited Entry—Customs Regulations amended

Section 12.40(c) of the Customs Regulations, relating to the seizure and disposition of articles or matter prohibited entry, amended

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 12—SPECIAL CLASSES OF MERCHANDISE

Section 12.40(b) of the Customs Regulations (19 CFR 12.40(b)) provides, in part, that upon the seizure of articles or matter prohibited

entry by section 305, Tariff Act of 1930, as amended, a notice of the seizure of such articles or matter shall be sent to the consignee or addressee. Paragraph (c) of this section, (19 CFR 12.40(c)) provides that when such articles and matter are of small value and no criminal intent is apparent, a blank assent to forfeiture, Customs Form 4609, shall be sent with the notice of seizure. Upon receipt of the assent to forfeiture duly executed, the articles shall be destroyed if not needed for official use and the case closed.

It has come to the attention of the United States Customs Service that the reference in section 12.40(c) to "a blank assent to forfeiture" as Customs Form 4609 is incorrect. Customs Form 4609 is the Petition for Remission or Mitigation of Forfeitures and Penalties Incurred. The correct reference to the assent to forfeiture is Customs Form 4607, Notice of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise and Certificate of Destruction. Therefore, it is necessary to amend section 12.40(c) to reflect the correct Customs Form number.

Accordingly, the first sentence of section 12.40(c) of the Customs Regulations (19 CFR 12.40(c)) is amended by substituting "Customs Form 4607" for "Customs Form 4609."

(R.S. 251, as amended, sec. 624, 46 Stat. 759. (19 U.S.C. 66, 1624))

Inasmuch as this amendment merely conforms the Customs Regulations with an existing administrative practice and requires no public initiative, notice and public procedure thereon is found to be unnecessary, and good cause exists for dispensing with a delayed effective date under the provisions of 5 U.S.C. 553.

*Effective date.* This amendment shall become effective upon publication in the FEDERAL REGISTER. (095630)

(ADM-9-03)

G. R. DICKERSON,
*Acting Commissioner of Customs.*

Approved September 7, 1976,
DAVID R. MACDONALD,
*Assistant Secretary of the Treasury.*

[Published in the FEDERAL REGISTER September 14, 1976 (41 FR 39021)]

# Decisions of the United States Customs Court



## *Customs Decision*

(C.D. 4669)

HUB FLORAL CORPORATION *v.* UNITED STATES

*Chenille stems*

CHENILLE STEMS—COVERED WIRE

Chenille stems composed of two strands of wire twisted around textile material in a manner which allows textile fibers to protrude held properly classifiable as other wire covered with textile material under item 642.97 of the TSUS. The wire articles provided for in item 642.97 need not be limited to single strands of wire nor do

they have to be covered in the conventional manner or with the same completeness as electrical wire.

CHENILLE STEMS—USE

Plaintiff's proof established that the use of chenille stems by florists to stem live flowers and fashion floral arrangements exceeded the use by hobbyists in making artificial flowers.

Court No. 71-9-01092

Port of Boston

[Judgment for plaintiff.]

(Decided August 31, 1976)

*Doherty and Melahn* (*William E. Melahn* and *Walter E. Doherty, Jr.* of counsel) for the plaintiff.

*Rex E. Lee*, Assistant Attorney General (*Frank J. Desiderio* and *Edmund F. Schmidt*, trial attorneys), for the defendant.

WATSON, Judge: This case involves the classification of articles known as chenille stems, 12-inch lengths of flexible wire twisted around textile material in a manner which allows the textile fibers to protrude prominently, giving the article a fuzzy caterpillar-like appearance. The chenille stems were classified as parts of artificial flowers,[1] a classification which in the terms of the tariff schedules general interpretive rules presupposes that the use of these articles as parts of artificial flowers exceeds all other uses combined.[2]

---

[1] Item 748.21 of the Tariff Schedules of the United States:

| | | |
|---|---|---|
| | Artificial flowers, trees, foliage, fruits, vegetables, grasses, or grains, parts of the foregoing, and articles made of the foregoing (except articles provided for in item 748.15 or 748.40 of this subpart): | |
| 748.21 | Other | 42.5% ad val. |

*General Headnotes and Rules of Interpretation*

10. General Interpretative Rules. For the purposes of these schedules—

(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

(j) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

Plaintiff argues for classification of the chenille stems as other wire covered with textile material [3] or alternatively as strands of wire covered with textile material.[4]

Plaintiff disproved the correctness of the assigned classification by showing it resulted from the erroneous reasoning that the use of such articles as stems for live flowers was a use as parts of artificial flowers. This error in the classification was revealed in the testimony of the customs import specialist who made the advisory classification and apparently arose from his reliance on a customs classification circular (C.I.E. 1705/64). That document (exhibit 2) was circulated to customs officials to promote uniform classification of chenille stems as parts of artificial flowers and it spoke of these articles as follows:

> The chenille stems are of metal wire covered with textile materials and are for insertion into the heads of natural flowers to serve as flower stems. . . .

The reasoning embodied in this circular and applied to the classification of the importations at bar is faulty. The tariff provision for artificial flowers envisions flowers which are entirely artificial. A natural flower with an artificial stem is not an artificial flower. It follows that the artificial stem of a natural flower is not part of an artificial flower.

After this demonstration of the erroneous nature of the classification, the case in effect became a fresh dispute with the government advocating classification as parts of artificial flowers based on chief use by hobbyists in the fashioning of artificial flowers and the plaintiff seeking to prove a greater use by florists in stemming natural flowers and making floral arrangements.

On this issue I found plaintiff's proof the more persuasive of the two, leading me to conclude that the uses of these articles by florists in connection with natural flowers exceeds that of hobbyists in making artificial flowers. Aside from the conflict of testimony from which I

---

[3] Item 642.97 of the TSUS, as modified by T.D. 68-9:

| | | |
|---|---|---|
| | Milliners' wire and other wire covered with textile or other material not wholly of metal: | |
| 642.97 | Other | [1960] 12% ad val.<br>[1970] 11% ad val. |

[4] Item 642.18 of the TSUS, as modified by T.D. 68-9:

| | | |
|---|---|---|
| | Strands, ropes, cables, and cordage, all the foregoing, of wire, whether or not cut to length, and whether or not fitted with hooks, swivels, clamps, clips, thimbles, sockets, or other fittings or made up into slings, cargo nets, or similar articles: Not fitted with fittings and not made up into articles: | |
| 642.18 | Covered with textile or other nonmetallic material | [1960] 12% ad val.<br>[1970] 12% ad val. |

felt defendant's witnesses came away second best, defendant's case was weakened by the aforementioned evidence of its previous reliance on the use of these articles in stemming natural flowers. I was not persuaded by defendant's argument that the stemming use had declined with the introduction of newer products in the field.

Furthermore, I found the proof as to the uses of individual hobbyists to be less than satisfactory. The multitude of forms and articles which can be made from these importations by the individual hobbyists made the proposition that only flowers are made in significant numbers seem tenuous to me. I found the proof of use by florists more direct, more credible and more plausible.

Following plaintiff's successful proof that the use of these articles by florists in connection with live flowers exceeds the use by hobbyists in fashioning artificial flowers (which is a negation of possible chief use as parts of artificial flowers) the dispute focuses on plaintiff's primary claim that these articles are properly classifiable as other wire covered with textile material under item 642.97 and its alternative claim that they are classifiable as strands of wire covered with textile material under item 642.18.

Defendant argues that the wire referred to in item 642.97 must be a single metal filament because the definition of wire in headnote 3(i) of schedule 6, part 2, subpart B speaks of wire in the singular as "[a] finished, drawn, non-tubular product, of any cross-sectional configuration, in coils or cut to length and not over 0.703 inch in maximum cross-sectional dimension."

If indeed this headnote means that wires named in part 2 of schedule 6 can only be classified therein if they consist of a single metal filament I would not consider this limitation to extend to the wire articles set out in part 3 of schedule 6, the part with which we are here concerned. In part 2, subpart B, wire is being considered in its quintessential form as one of the basic shapes of iron or steel (schedule 6, part 2, subpart B, headnote 1). In such a context a limitation to articles of irreducible single filament form might be plausible. However, part 3 deals with wire in more differentiated forms in which a limitation to single filament articles would be artificial. I fail to see for example how the barbed wire of item 642.02 would not be considered barbed wire if it were composed of a double strand of wire set with barbs or how the galvanized wire fencing of item 642.35 would exclude fencing composed of doubled wire.

Moreover, the headnote to part 3 which deals with wire refers back to the part 2 headnote only for the maximum cross-sectional measurement and does not reiterate the remaining language with its potential single filament implications. It states that " 'wire' is deemed to be a

base-metal product which conforms to the respective cross-sectional measurements for base-metal wires in part 2, *whether or not conforming otherwise to the specifications set forth therein.*" (Emphasis supplied.) It seems to me the headnote to part 3 was written with an awareness that it was directed to articles composed of wire and still displaying the characteristics of wire but without any intention that the wires referred to in part 3 be single filament articles only.

Consequently, when the tariff provision to which item 642.97 refers lists milliners' wire and other wire covered with textile material, I see no reason either in the headnote or in the fact that wire in its basic form may be defined in the singular to hold that these articles may not be composed of more than one filament of wire. In short I would not read a limitation to single filament articles into part 3 because the only headnote from which such a limitation could be derived does not apply to part 3 except to provide a cross-sectional measurement and the more reasonable way to read the wire articles named in part 3, including item 642.97, is to require that they be composed of wire with the requisite cross-sectional dimension and not necessarily that they be a single filament of that wire.

In somewhat the same vein as defendant's argument that the wire described in item 642.97 must be of a single filament is its contention that the textile covering must be a complete covering.

I don't think it is correct to posit a single unvarying meaning for the word "covered." In the abstract sense it certainly will admit of meanings which allow a less than all-enclosing covering. In the provision under consideration, I can understand it to describe wire which has a textile covering which for some reason still allows glimpses of the underlying wire.

Defendant relies heavily on the existence in prior tariff acts of a single provision governing covered wire (paragraph 316(a) of the Tariff Act of 1930; paragraph 316 of the Tariff Act of 1922). I don't think those provisions or their interpretations ever foreclosed the possibility of a less than "perfect" covering. In fact, when the word "covered" was implicitly treated as meaning completely covered, it was only with respect to electrical wire where such a view has an obvious logical and functional basis.[5] However, the provision under consideration resulted from a deliberate and clearly expressed intention to distinguish in the tariff schedules between "electrical" and

[5] *United States* v. *C. J. Tower & Sons*, 17 CCPA 201, T.D. 43647 (1929); *Mitsui & Co. (U.S.A.), Inc.* v. *United States*, 65 Cust. Ct. 268, 271-72, C.D. 4087 (1970).

nonelectrical wire. (*Tariff Classification Study*, 1960, Schedule 6, p. 183.)

It follows in my view that the interpretation of covering which should be made in this new provision should relate to the nature of the articles provided for and not be an unquestioning automatic carryover from prior consideration of electrical wire. It is my opinion the wire provided for in this item is of a type regarding which a requirement of a perfect covering would be unrealistic and excessive.

Milliners' wire is a fiber-wrapped wire which is sewn into hats to provide shaping. The existence of wires of a similar nature was recognized in the 1948 *Summaries of Tariff Information* (Vol. 3, part 2, p. 127) when mention was made of covered steel wire—" . . . for fastening decorations, as for florists, and other nonelectrical uses." Still further back is found mention in the *Summary of Tariff Information* of 1921 (p. 407) of wire covered with cotton, silk, paper or other materials, used extensively in the manufacture of millinery, novelties, tags, artificial flowers, clothing and electrical manufactures. I therefore find good reason to associate the imported wire (which has here been proved to be used predominantly by florists in stemming flowers and fashioning floral arrangements) with the covered wires which have been historically noted and recently provided for in the separate provision of item 642.97. I further find that these are not articles in which there is a reasonable ground for demanding absolute perfection or conventional completeness of covering. There is no indication that their covering need be more than substantial to have them serve the purpose for which they are used.

My examination of these articles persuades me that they are covered within the meaning of that term. Admittedly the textile material which forms the cover is initially entrapped between two strands of wire so that the filaments which form the cover emanate from the core of the article. But the practical, tactile and visual result is a covered wire. The purpose of uniting the wire and the textile material is to obtain a product with the flexible strength of wire and the external characteristics of the fiber. These external characteristics are an aid to the comfortable handling and manipulation of the wire, an important improvement of its gripping power and a cushioning of what would otherwise be the damaging impress of the wire on the material around which it may be twisted. The fibers also have an obvious visual effect, adding color and bulk to the wire and concealing it to a great extent from all but the closest scrutiny. These are all functions of a covering and to hold that this article is not covered merely because the covering is achieved in an unconventional manner and to a less than total extent would be unreasonably restrictive.

In sum, I conclude that these chenille stems are wire covered with textile material and are not to be excluded from the provision which is most appropriate for their classification both by plain meaning and history merely because they are composed of two strands of wire and are covered in an unconventional manner.

In light of my conclusions regarding the appropriateness of item 642.97, particularly as viewed in its historical context, I do not dwell on plaintiff's alternative claim under item 642.18. Although that provision might have some literal appeal in that it speaks of "strands" of wire, I read it as governing articles made to sustain weight or tension or transmit force in some manner, *See Flexible Plumber Tools, Inc.* v. *United States*, 66 Cust. Ct. 330, C.D. 4210 (1971).

Judgment will be entered accordingly.

# Decisions of the United States Customs Court

## *Custom Rules Decision*

(C.R.D. 76–9)

THE AMERICAN GREINER ELECTRONIC, INC. *v.* UNITED STATES

*Watch timers—Valuation*

Court Nos. R61/20887, etc.

Port of New York

[Motion for summary judgment denied.]

(Dated September 3, 1976)

*Barnes, Richardson & Colburn* (*Joseph Schwartz* of counsel) for the plaintiff.

*Rex E. Lee*, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

LANDIS, Judge: Plaintiff, in this consolidated action, moves for summary judgment [1] sustaining its claim that watch timers, imported from Switzerland and appraised on the basis of constructed value, [2] should properly be valued on the basis of export value. [3]

---

[1] United States Customs Court Rule 8.2.

[2] 19 U.S.C.A. § 1401a(d) defines constructed value as follows:

(d) For the purposes of this section, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under going appraisement which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the couutry of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

[3] 19 U.S.C.A. § 1401a(b) defines export value as follows:

(b) For the purposes of this section, the export value of imported merchanside shall be the price, at the time of exportation to the United Stated States of the merchandise under going appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

*Inter alia*, plaintiff contends that, as a matter of fact, it cannot be genuinely contested that the merchandise and issues in this case are the same in all material respects as the merchandise and issues in *United States* v. *The American Greiner Electronic, Inc.*, 66 Cust. Ct. 644, A.R.D. 289, 328 F. Supp. 498 (1971); that, on export value basis, the merchandise in this case was sold in the ordinary course of trade to a selected purchaser at a price which fairly reflects the market value of the merchandise, and that the invoice prices were the result of *bona fide* negotiations between the seller and the purchaser.

Defendant opposes the motion on the ground that the merchandise and issues are unlike the merchandise and issues in *American Greiner*, *supra*. Defendant, *inter alia*, also states that it materially disputes the fact that the merchandise was sold in the ordinary course of trade; that the merchandise was sold to a selected purchaser at a price which fairly reflects the market value of the merchandise, or that the invoice prices were the result of *bona fide* negotiations between the seller and purchaser.

In a cross-motion, which plaintiff opposes, defendant further seeks an order "allowing the use of the discovery procedures authorized by the Rules of this Court to obtain the deposition of directors and officers of plaintiff, including, but not limited to, Rudolf Greiner, Sr., the president and sole owner of plaintiff, and Rudolf Greiner, Jr.", identified as not available in the United States.

I conclude that both motions should be denied.

Plaintiff places great reliance on the decision in *American Greiner* to sustain its claim in this case. That case involved one watch timer, a "Chronografic Record" model exported from Switzerland in August 1960. This consolidated action involves some fifteen different models of watch timers exported in years other than 1960. The value of merchandise is its statutory value on the date or dates of exportation, *Erb & Gray Scientific, Inc.* v. *United States*, 53 CCPA 46, C.A.D. 875 (1966). Defendant, in opposition, quite obviously differs with plaintiff with respect to facts material to a finding of statutory export value. Speaking for the United States Court of Appeals, Second Circuit, in *Heyman* v. *Commerce and Industry Insurance Company*, 524 F. 2d 1317, 1319 (2d Cir. 1975), Chief Judge Kaufman, concerned with the frequent recurrence of cases in which granting summary judgment was inappropriate, cautioned that

> * * * the "fundamental maxim" remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. * * * Moreover, [4] when the court considers a motion for summary judg-

[4] See also, *S. S. Kresge Co.* v. *United States*, 77 Cust. Ct. —, C.R.D. 76-6 (1976).

> ment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, * * * with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute * * *. This rule is clearly appropriate, given the nature of summary judgment. This procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury. * * *

In *United States* v. *J. B. Williams Company, Inc.*, 498 F. 2d 414, 430 (footnote 19), (2d Cir. 1974), Judge Friendly, in his written opinion for the Court of Appeals, stated:

> There is no question that under F.R. Civ. P. 56, *whether in a jury trial or a trial to the court* [emphasis added], the party opposing the summary judgment motion has a right to a full evidentiary hearing on all genuine issues of material fact. In a bench trial, this means that if the party opposing summary judgment raises any triable fact questions, he has the right to adduce the expert testimony of live witnesses and cross-examine his opponent's witnesses rather than to have to rely on the affidavits submitted in opposition to the summary judgment motion. * * *

Since there are material differences between plaintiff and defendant with respect to relevant facts, I am of the opinion that defendant should not be summarily cut off from its right to a full scale trial of the facts. *Nickol* v. *United States*, 501 F. 2d 1389 (10th Cir. 1974). Plaintiff's motion for summary judgment is, accordingly, denied.

For substantially the same reasons that I discussed in connection with defendant's motion in *Life-O-Matic Products, Inc., et al.* v. *United States*, 72 Cust. Ct. 306, C.R.D. 74–6 (1974), defendant's cross-motion for an order allowing discovery procedures to obtain a deposition is also denied.

# Decisions of the United States Customs Court

## *Abstracts*

## *Abstracted Protest Decisions*

DEPARTMENT OF THE TREASURY, *September 7, 1976.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

VERNON D. ACREE,
*Commissioner of Customs.*

| DECISION NUMBER | JUDGE & DATE OF DECISION | PLAINTIFF | COURT NO. | ASSESSED | HELD | BASIS | PORT OF ENTRY AND MERCHANDISE |
|---|---|---|---|---|---|---|---|
| | | | | Par. or Item No. and Rate | Par. or Item No. and Rate | | |
| P76/201 | Maletz, J. August 31, 1976 | Stahlwood Toy Mfg. Co., Inc. | 73-12-03321 | Item 737.90 17.5% | Item 737.55 10% | Judgment on the pleadings | New York "Snap blocks" (style no. 326), "play blocks" (style no. 123) (entries 232222 and 401833)—(motion denied as to entry 252558) |
| P76/202 | Landis, J. September 2, 1976 | J. E. Bernard & Co., Inc. | 68/55731, etc. | Item 684.70 15% or 13% | Item 709.50 12% or 10.5% | Knowles Electronics et al. v. U.S. (C.D. 4483) | Chicago Receivers |

**Appeal to the United States Court of Customs and Patent Appeals**

APPEAL 76-36.—United States *v.* Rockwell Import Corporation.—GIANDUJA CHOCOLATE COATING—CONFECTIONERS' COATINGS—SWEETENED CHOCOLATE IN BARS OR BLOCKS—CANDY AND OTHER CONFECTIONERY—EDIBLE PREPARATIONS—TSUS. Appeal from C.D. 4664.

In this case merchandise described on the invoices as Gianduja Sweet Chocolate Coating was assessed at 5 percent ad valorem under item 156.47, Tariff Schedules of the United States, as confectioners' coatings and other products (except confectionery). Plaintiff-appellee claimed that the merchandise should be assessed at the rate of 0.8 cent per pound under item 156.25 as sweetened chocolate in bars or blocks weighing over 10 pounds each. Defendant-appellant claimed that the merchandise was properly classified under item 156.47. Defendant alternatively claimed, on the basis of the evidence, that the merchandise should be dutiable, first, at 14 percent under item 157.10 as candy and other confectionery, not specially provided for, and, second, at 20 percent under item 182.91 as edible preparations, not specially provided for, other than gelatin. The Customs Court sustained plaintiff's claim for classification under item 156.25, *supra*, and overruled defendant's alternative claims for classification under item 157.10 and item 182.91.

It is claimed that the Customs Court erred in finding and holding that the merchandise in issue is properly classifiable under item 156.25, *supra;* in not finding and holding that it was properly classified under item 156.47, *supra;* in not finding and holding that the customs classification of the merchandise was consistent with the statutory definition of chocolate; in not finding and holding that the product was a product containing not less than 6.8 percent non-fat solids of the cocoa bean nib and not less than 15 percent of vegetable fats other than cocoa butter; in not finding and holding that a product containing 33.219 percent chopped or refined hazelnuts and 19.875 percent ground cocoa, beans, by weight, cannot be a product "consisting wholly of ground cocoa beans, with or without added fat, sweetening, milk, flavoring, or emulsifying agents"; in finding and holding that item 156.25 is more specific than item 156.47; in not finding and holding that items

156.47 and 156.25 are mutually exclusive provisions, covering different types of merchandise; in rendering a decision and judgment based upon a misreading of the statutes; in not following the holding of this Honorable Court in *C. J. Van Houten & Zoon, Inc., Bluefries, New York, Inc.* v. *United States*, 48 CCPA 116, C.A.D. 775 (1961), and in following and compounding the error of *Border Brokerage Co., Inc.* v. *United States*, 62 Cust. Ct. 624, C.D. 3836 (1969).

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## U.S. Customs Service



## Customs Court

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